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CLERK

In The
Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

vs.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED MAY 14, 1990
WRIT OF CERTIORARI GRANTED OCTOBER 1, 1990

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

September 3, 1985 – Complaint filed by the Native Village of Akiachak, the Native Village of Noatak, and Circle Village in the United States District Court for the District of Alaska.

September 30, 1985 – Answer filed by the State of Alaska.

July 18, 1986 – Motion to dismiss filed by the State of Alaska.

October 28, 1987 – District Court issues an oral ruling of dismissal.

October 29, 1987 – District Court issues a written order of dismissal.

October 30, 1987 – Notice of appeal filed by the Native Village of Noatak.

November 5, 1987 – District Court issues a judgment of dismissal.

November 24, 1987 – Notice of appeal filed by Circle Village.

March 30, 1989 – Opinion issued by the Court of Appeals for the Ninth Circuit.

April 12, 1989 – Petition for rehearing and suggestion for rehearing en banc filed by the State of Alaska.

May 12, 1989 – Court of Appeals for the Ninth Circuit issues an order directing that a response to the petition for rehearing and suggestion for rehearing en banc be filed.

June 2, 1989 – Response to petition for rehearing and suggestion for rehearing en banc filed by the Native Village of Noatak and Circle Village.

July 7, 1989 – Court of Appeals for the Ninth Circuit issues an order that the parties file supplemental briefs on the issue of 11th amendment immunity.

February 12, 1990 – Court of Appeals for the Ninth Circuit withdraws its March 30, 1989 opinion, denies the petition for rehearing, rejects the suggestion for rehearing en banc, and issues an amended opinion.

May 14, 1990 – Petition for a writ of certiorari filed by the State of Alaska.

October 1, 1990 – Writ of certiorari granted by the United States Supreme Court.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---------------------------|---|--------------|
| NATIVE VILLAGE OF |) | |
| AKIACHAK, NATIVE VILLAGE |) | |
| OF NOATAK, AND CIRCLE |) | No. A-85-503 |
| VILLAGE ON BEHALF OF |) | COMPLAINT |
| THEMSELVES AND ALL |) | FOR |
| OTHERS SIMILARLY |) | DECLARATORY |
| SITUATED, |) | AND |
| |) | INJUNCTIVE |
| Plaintiffs, |) | RELIEF |
| vs. |) | |
| EMIL NOTTI, AS |) | |
| COMMISSIONER DEPARTMENT |) | |
| OF COMMUNITY AND REGIONAL |) | |
| AFFAIRS, STATE OF ALASKA, |) | |
| Defendant. |) | |

The Plaintiffs on their own behalf and on behalf of all others similarly situated allege as follows:

JURISDICTION AND VENUE

1. This action is brought by Alaska Native Tribes and arises under the Constitution, laws, and treaties of the United States. The Court's jurisdiction is invoked under 28 U.S.C. 1331 (Federal Question); 28 U.S.C. 1343(3) (Civil Rights); and 28 U.S.C. 1362 (Indian Tribe); Venue properly lies in the District of Alaska under 28 U.S.C. 1391(b); Declaratory Relief is authorized by 28 U.S.C. 2201 and 2202 and Rule 57, Fed. R. Civ. P.

NATURE OF THE ACTION

2. This is a civil action for declaratory and injunctive relief, and for recovery of statutory entitlements withheld in violation of the Constitution and laws of the United States and the State of Alaska. Plaintiffs individually and on behalf of all others similarly situated, seek, a declaration that the actions of the Defendant in denying Plaintiffs their full entitlement of State Revenue Sharing funds and restricting use of the funds received, (a) violate Plaintiffs' rights under Articles I and VI and the First & Fourteenth Amendments to the United States Constitution, (b) infringe upon Plaintiffs' powers of self-government and are preempted by and in violation of federal law and policy, and (c) violate Plaintiffs' rights under Art I of the Alaska Constitution, the Revenue Sharing Act, AS 29.89.010 and AS 29.89.050 and the Administrative Procedure Act, AS 44.62.010 *et seq.*

PARTIES

3. Plaintiffs, Native Village of Akiachak (a.k.a.) Akiachak Native Community) and Native Village of Noatak are Native Village Governments situated within the State of Alaska with local governing bodies organized under the Indian Reorganization Act 25 U.S.C. 476, and are recognized by the United States.

4. Circle Village is a Native Village Government situated within the State of Alaska with a traditional Council form of government and is recognized by the United States.

5. Defendant, Emil Notti is the Commissioner of the Alaska State Department of Community and Regional Affairs (DCRA). As commissioner he is the principal executive officer of the Department AS 44.47.010, and responsible for administering the payment of State Revenue Sharing funds to Native Village Governments pursuant to AS 44.47.050 (14), AS 29.89.010 and AS AS 29.89.050.

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil procedure. The class Plaintiffs seek to represent includes all Alaska Native village governments in villages not incorporated as cities who were entitled to, but failed to receive, their full share of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050.

7. The class is so numerous that joinder of all members is impracticable. While the exact number has yet to be determined, Plaintiffs estimate the class to consist of 55 Native village governments.

8. The questions of law and fact presented are common to the class. All members of the class were denied their full entitlement of Revenue Sharing funds and the right to unrestricted use of the funds received under AS 29.89.010 and AS 29.89.050.

9. The claims of the named Plaintiffs are typical of the claims of the class.

10. Plaintiffs are represented by competent counsel with extensive experience in the areas of Indian Law and

entitlement to Public benefits and will fairly and adequately protect the interests of the class.

11. This action is properly maintained as a class action in that:

(a) Separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant who opposes the class; and

(b) The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

GENERAL ALLEGATIONS

12. On July 1, 1980 Sections AS 29.89.010 and AS 29.89.050 of the State Revenue Sharing Act were adopted. In pertinent part they provide:

AS 29.89.010 *Revenue Sharing Payable . . . the Department (of Community and Regional Affairs) shall pay aid . . . ,*

(2) to a Native village government under AS 29.89.050.

AS 29.89.050. *State aide to Native village governments. The state shall pay \$25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, Native village government means:*

(1) a local governing body organized by authority of the Act of Congress of June 18, 1934.

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980).

13. Plaintiffs, Native Village of Noaktak [sic] and Circle Village are governments for Villages not incorporated as cities and therefore since July 1, 1980 have been authorized to receive annually, their pro-rata share of the funds appropriated by the legislature up to \$25,000, respectively, in unrestricted State Revenue Sharing funds pursuant to AS 29.89.010 and AS 29.89.050.

14. The City of Akiachak is in the process of dissolving its Municipal Government pursuant to AS 29.68.510-580. Upon its dissolution Plaintiff, Native Village of Akiachak will likewise become authorized to receive \$25,000 in State Revenue Sharing funds pursuant to AS 29.89.010 and AS 29.89.050.

15. Defendant Notti and his predecessors have, however, denied and continue to deny Plaintiffs their full entitlements of Revenue Sharing funds under these Statutes and restrict use of the funds Plaintiffs are allowed to receive. In so doing, Defendant Notti relies upon Opinions of the Department of Law dated April 27 and September 2, 1981, copies of which are attached hereto marked Exhibits A & B respectively. According to these Opinions, Native village governments are racially exclusive entities and therefore it would be unconstitutional to

read AS 29.89.010 and AS 29.89.050 literally, so as to limit aid exclusively to Native village governments. The Department of Law contends that excluding unincorporated non-Native villages, from the Revenue Sharing program would violate the Equal Protection provisions of the Federal and Alaska Constitutions, (14th Amend. U.S. Const., Article I, Section 1. Alaska Const.) as well as the Public Purpose provision of the latter, (Article IX, Section 6, Alaska Const). The Opinions also assert that these Constitutional provisions plus the Local Government provision of the Alaska Constitution (art.X sec.2) would be violated if Revenue Sharing funds were used for general support of Native village governments. Finally, the Opinions claim that the State is prohibited from supporting Native village governments, because the Alaska Native Claims Settlement Act 43, U.S.C. 1601 *et seq*, extinguished the governmental powers of all Native Villages with the exception of Metlakatla (Ex. A, p.1). The opinions, however, conclude that these unconstitutional results could be avoided by rewriting the Revenue Sharing Statutes to:

- (a) delete the terms "Native" and "Government" and the definition of "Native village government" from AS 29.89.010 and AS 29.89.050 thereby expanding the group of eligible Communities to include all unincorporated Villages, both Native and non-Native; and
- (b) prohibit the use of State Aid for the general support of Native village governments. (Ex. B p.1)

16. For the reasons set forth by the Department of Law in these opinions and following the Departments advice Defendant Notti and his predecessors:

- (a) expanded the class of eligible Revenue Sharing recipients under AS 29.89.010 and AS 29.89.050 to include entities other than Native village governments, thereby substantially diluting the Revenue Sharing funds available for distribution to Native village governments. A copy of the DCRA's Revenue Sharing Application which expressly expands the class is attached hereto as Exhibit C;
- (b) adopted Regulation 19 AAC 30.015 (c)(1) requiring Plaintiffs and their class, as a condition to receipt of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050, to irrevocably dedicate such funds to a public purpose other than the general administration of Native village governments.

17. Prior to enlarging the group of eligible recipients of Revenue Sharing funds, thereby denying Plaintiffs and the class their full entitlements under AS 29.89.010 and 29.89.050, Defendant Notti and his predecessors failed to give notice, conduct hearings, submit and file proposed regulations or otherwise comply with the requirements of the Administrative Procedure Act, AS 44.62.010 *et seq.*

18. In every year since enactment of the Revenue Sharing Act on July 1, 1980, Defendant Notti and his predecessors have received money appropriated by the legislature for use of Plaintiffs and their class pursuant to AS 29.89.010 and AS 29.89.050. Since October 1, 1981, however, in reliance on the Opinions of the Department of Law, Defendant Notti and his predecessors have failed and refused to pay over to Plaintiffs and the class their

full Statutory entitlements which in equity and good conscience they should be paid. Defendant Notti owes Plaintiffs and their class \$853,587.51 for all such monies had and received.

19. The Department of Law's Construction of the Alaska Native Claims Settlement Act to extinguish Native Village powers of self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) based on such construction, are contrary to and in violation of the Alaska Native Claims Settlement Act which was designed to settle aboriginal lands claims and was not intended to, and did not, divest, diminish or in any way affect the governmental powers of Native Village Governments.

FIRST CAUSE OF ACTION

20. The actions of Defendant Notti and his predecessors in deliberately and purposely expanding the class of eligible Revenue Sharing recipients to include entities other than [sic] Native Village Governments, thereby depriving Plaintiffs and the class of their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of State law and based solely on the racial ancestry of the individual members of Plaintiffs and their class and were therefore in violation of the Due Process, Equal Protection, Indian Commerce, and Supremacy Clauses of the United States Constitution, (Art I, Sec 1, 14th Amend; Art I, Sec 8, cl 3; Art VI, cl 2); as well as 42 U.S.C. 1983 and Federal Common Law authorizing discrete treatment of Indian Tribes and their members.

SECOND CAUSE OF ACTION

21. The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1), restricting the use of State Revenue Sharing funds, constitute an infringement upon tribal powers of self-government and are preempted by and in violation of federal laws and policy intended to further tribal self-government including the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, *as amended* with respect to Alaska Natives in 1936, 49 Stat. 1250, 25 U.S.C. 461-79; the Indian Civil Rights Act of 1968, Pub. L. 90-294 Title II, 82 Stat. 77, 25 U.S.C. 1301-1341; the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. 1451 *et seq*; the Indian Self-Determination and Education Act of 1975, 88 Stat. 2203, 25 U.S.C. Sections 450-450 n; the Indian Health Care Improvement Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601 *et seq*; the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. 1901 *et seq*; and The Indian Tribal Tax Status Act of 1982, Title II, Pub. L. No. 97-473, 26 Stat. 2605 *as amended* by Pub. L. No. 98-21, 97 Stat. 65, 25 U.S.C. 7871.

THIRD CAUSE OF ACTION

22. The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1) prohibiting Plaintiffs and their class from contracting for the use of State funds for the support of Native village governments and the State Constitutional provisions upon

which such regulation is purportedly based are preempted by and in violation of 25 U.S.C. 476 which grants Native Tribes and States the unrestricted right to contract with each other.

FOURTH CAUSE OF ACTION

23. The Department of Law's construction of the Alaska Native Claims Settlement Act to extinguish Native Village powers of tribal self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) and in expanding the class of eligible Revenue Sharing recipients, thereby denying Plaintiffs their full entitlements under AS 29.89.010 and AS 29.89.050 based on such construction, violate the First Amendment Rights of Plaintiffs, and their class as well as their respective individual members, to Freedom of Expression, Association and Religion in that the destruction of Native powers of self-government likewise destroys Native culture and their way of life – the most basic form of Expression, Religion and Association.

PENDENT JURISDICTION OF STATE CLAIMS

24. The Court has and should assume pendent jurisdiction over the Fifth through Eighth Causes of Action set forth below, which arise under Alaska State Law because they are based on the same operative facts as the federal causes of action set forth in the first four Causes of Action above and it would result in judicial economy, convenience and fairness to the parties.

FIFTH CAUSE OF ACTION

25. Defendant Notti and his predecessors unlawfully expanded the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Plaintiffs and the class their full Revenue Sharing entitlements without giving prior public notice, conducting hearings or submitting proposed regulations for filing in violation of the Administrative Procedure Act, AS 44.62.190-210.

SIXTH CAUSE OF ACTION

26. The failure of Defendant Notti and his predecessors to give Plaintiffs and the class their full entitlements of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050 constitutes a breach of Defendant Notti and his predecessor's duty to pay over monies had and received for the use of Plaintiffs and their class.

SEVENTH CAUSE OF ACTION

27. The actions of Defendant Notti and his predecessors in implementing the Department of Community and Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting the use of Revenue Sharing funds for general administration of Native village governments were in violation of the Administrative Procedure Act, AS 44.62.030, as well as AS 29.89.010 and AS 29.89.050 because such prohibition is neither consistent with, nor reasonably necessary to carry out, such Statutes or other provisions conferring rule making authority on the Department of Community and Regional Affairs.

EIGHTH CAUSE OF ACTION

28. The actions of Defendant Notti and his predecessors in expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Native village governments their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of law and based solely on the racial ancestry of individual members of the respective Native village governments and were therefore in violation of the Due Process and Equal Protection Clauses of the Alaska Const., Art I, Sec 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the Court to issue an order:

1. Determining that this is a proper class action and that Plaintiffs are authorized to represent all other similarly situated.
2. Granting a preliminary and permanent injunction prohibiting Defendant Notti from paying over monies appropriated by the Legislature pursuant to AS 29.89.010 and AS 29.89.050 to such entities or in such manner as would preclude Plaintiffs and their class from receiving their full Revenue Sharing entitlements.
3. Granting a preliminary and permanent injunction enjoining Defendant Notti from implementing the Department of Community and Regional Affairs Regulation 19 AAC 30.015 (c)(1) or otherwise prohibiting the recipients of Revenue Sharing Funds under AS 29.89.010 and AS 29.89.050 from

using such funds to support their Native village governments.

4. Granting a preliminary and permanent injunction enjoining Defendant Notti, his successors in office, agents, employees, all persons acting by, through, or under him, and all persons subject to his supervision or acting in concert with him, from engaging in the unlawful acts described above, and ordering Defendant Notti to pay over to Plaintiffs and their class \$853,587.51 in Revenue Sharing funds which they would have otherwise received had the Defendant and his predecessors not engaged in said unlawful acts.
5. Granting a final Judgement declaring that:
 - (a) The actions of Defendant Notti and his predecessors in deliberately and purposely expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby depriving Plaintiffs and the class of their full entitlements under AS 29.89.010 and AS 29.89.050, were taken under color of State law and based solely on the racial ancestry of the individual members of Plaintiffs and their class and were therefore in violation of the Due Process, Equal Protection, Indian Commerce and Supremacy Clauses of the United States Constitution (art I, sec 1, 14th Amend; art I, sec 8, cl 3; art VI, cl 2) as well as 42 U.S.C. 1983 and Federal Common Law authorizing the discrete treatment of Indian Tribes and their members.
 - (b) The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full

- entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1), restricting the use of State Revenue Sharing funds, constitutes an infringement upon Plaintiffs powers of self-government and are preempted by and in violation of Federal laws and policy intended to further tribal self-government including, the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, *as amended* with respect to Alaska in 1936, 49 Stat. 1250, 25 U.S.C. 461-79; the Indian Civil Rights Act of 1968, Pub. L. 90-294 Title II, 82 Stat. 77, 25 U.S.C. 1301-1341; the Indian Financing Act of 1974, 88 Stat. 77, 215 U.S.C. 1451 *et seq*; the Indian Self-Determination and Education Act of 1975, 88 Stat. 2203, 25 U.S.C. Section 450-450n; the Indian Child Welfare Act of 1978, 92 Stat. 3609, 25 U.S.C. 1901 *et seq*; the Indian Health Care Improvement Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601 *et seq*; and the Indian Tribal Tax Status Act of 1982, Title II Pub. L. No. 97-473, 26 Stat. 2605 U.S.C. *as amended by* Pub. L. No. 98-21, 97 Stat. 65, 26 U.S.C. 7871
- (c) The Department of Community and Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting Plaintiffs and their class from contracting for the use of State Revenue Sharing funds for the support of Native village governments violates 25 U.S.C. 476 which grants Indian Tribes and States the unrestricted right to contract with each other.
 - (d) The Department of Law's construction of the Alaska Native Claims Settlement

Act to extinguish Native Village powers of self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) based on such construction, violate the First Amendment Rights of Plaintiffs and their class, as well as their respective individual members, to Freedom of Expression, Association and Religion in that the destruction of Native powers of self-government likewise destroys Native culture and their way of life – the most basic form of Expression, Religion and Association.

- (e) Defendant Notti and his predecessor's unlawfully expanded the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Plaintiffs and the class their full Revenue Sharing entitlements without giving prior public notice, conducting hearings or submitting proposed regulations for filing in violation of the Administrative Procedure Act, AS 44.62.190-210.
- (f) The failure of Defendant Notti and his predecessors to give Plaintiffs and the class their full entitlements of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050 constitutes a breach of Defendant Notti and his predecessor's duty to pay over monies had and received for the use of Plaintiffs and their class.
- (g) The actions of Defendant Notti and his predecessors in implementing the Department of Community and

Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting the use of Revenue Sharing funds for general administration of Native village governments were in violation of the Administrative Procedure Act, AS 44.62.030, as well as AS 29.89.010 and AS 29.89.050 because such prohibition is neither consistent with, nor reasonably necessary to carry out, the purposes of AS 29.89.010 and AS 29.89.050 or other Statutory provisions conferring rule making authority on the Department of Community and Regional Affairs.

- (h) The actions of Defendant Notti and his predecessors in expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Native village governments their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of law and based solely on the racial ancestry of individual members of the respective Native village governments and were therefore in violation of the Due Process and Equal Protection Clauses of the Alaska Const., Art I, Sec 1.
6. Award Plaintiffs and their class pre-and post-judgment interest.
 7. Award Plaintiffs and their class costs and Attorney fees.

8. Grant such other and further relief as the Court may deem just and equitable.

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Exhibit A

MEMORANDUM

State of Alaska

To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: April 27, 1981

FILE NO: J-66-335-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ R W P
Rodger W. Pegues
Assistant Attorney General

SUBJECT: State revenue sharing with IRA councils and traditional councils, chiefs, or other governing bodies

You have asked for additional advice on this subject.

Under AS 29.89.050, the state pays \$25,000 annually to a "Native village government for a village which is not incorporated as a city. . . ." The term is defined as a local governing body organized under section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (1963) which was applied to Alaska by the Act of May 1, 1936, 25 U.S.C.A. § 473a (1963),* or as a traditional village council, paramount chief, or other governing body of a village.

This statute creates serious constitutional problems. If the money is not expended by the recipient to provide public services in a racially non-discriminatory manner, the public purpose clause** and the equal protection clause*** of the Alaska Constitution will have been violated. *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963). The test, however, is not the racial or religious character

* There is a question whether any section 16 tribal organization, other than the Metlakatla Indian Community Annette Islands Reserve, Alaska, still exercises governmental powers after the enactment of the Alaska Native Claims Settlement Act.

** Alaska Const., art. IX, § 6. "No tax shall be levied, or appropriation of public money made, or public property transferred . . . except for a public purpose."

*** Alaska Const., art. I, § 1; U.S. Const., Amend. XIV, § 1.

of the recipient but the character of the use to which the money will be put. *Id.* And the courts will look at the entire factual and governmental context on a case-by-case basis to determine whether the expenditure serves a public purpose. *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970). Accordingly, the constitutional provisions which require a public purpose and equal protection will not be offended so long as the services provided by a village council are furnished on a non-discriminatory basis.

A much less easily resolved problem lies in another provision of the Alaska Constitution, article X, section 2:

All local government power shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

This limitation of "local government power" to boroughs and cities is preceded by a purpose clause which states:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

The record of the debates at the Constitutional Convention makes it clear beyond reasonable doubt that this threefold statement of purpose and construction precisely and concisely sums up the essence of the article on local government and the intent of its framers. The framers perceived three evils hobbling local government in Alaska and elsewhere: One, there were a multiplicity of overlapping, special (often single) purpose districts, each

little known to the average voter and each monomaniacally pursuing its own goals in disregard and often in conflict with other special purpose districts occupying the same, or part of the same, area. Two, many of these districts operated on revenues from special purpose projects, for example sewage disposal districts. Others levied taxes. Their single purpose orientation, lack of centralized control and responsibility, distance from any meaningful relationship to the voters, and lack of any need to compete for a share of an integrated budget made tax levies and expenditures excessive and irrational. Three, the courts had hobbled local governments with general rules for construing their powers under which local governments could not respond to pressing needs because they could not find some express provision of a statute or charter which gave them the power to act on the subject. The framers crafted article X to cure or remove all three evils. *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543-545 (Alaska 1962).

The provisions of article X carry out the framers purposes. They prescribed that a "liberal construction shall be given to the powers of local government units." Alaska Const., art. I, § 1. They limit local government powers to cities and boroughs. *Id.*, § 2. They allow the legislature to delegate taxing power to boroughs and cities only. *Id.* They prohibit new special districts ("service areas") from being established "if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city." *Id.*, § 5. The adoption of home rule charters is placed in the hands of local voters, *id.*, § 9, and home rule local governments have all powers

not prohibited by law or charter. *Id.*, § 11. Finally, to make boundary changes, including mergers, as easy as possible, a state commission is empowered to change them, subject only to a two-house veto by the legislature. *Id.*, § 12. In other words, if the constitution is followed, none of the three evils the framers sought to cure and avoid can exist in Alaska.

The use of traditional village councils or IRA councils to provide local government services is at odds with the constitution's provisions on local government. The public services they would perform are those which local governments perform. The Alaska Constitution limits the exercise of those powers by political subdivisions of the state to boroughs and cities. The tribal councils are neither. If they are duly organized under section 16 of the Act, 25 U.S.C.A. 476 (1963), they are tribal governments with sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127 (D. Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Financing a broad range of tribal government activities on the part of the councils is not for a public purpose of the state. Financing a broad range of non-tribal, local government activities through the councils would effectively raise them to the status of local governments. That conflicts with the constitutional mandate that the legislature may only use cities or boroughs to provide local government, and it indubitably removes any incentive – or even any rational basis – for a village to incorporate as a city. It would also have the practical effect of creating or sanctioning a racially exclusive de facto local government under color of state law, which is the reason that tribal councils cannot be designated by the state to be cities or

local governments. Under the Equal Protection Clause, the state cannot set up racially exclusive political subdivisions.

This is not to say that the state cannot *contract* with a racially (or religiously) exclusive group to provide public services or manage a public facility on a non-discriminatory basis for all the residents of a community. On a limited basis, therefore, grants can be made to IRA councils in their capacity as business corporations to provide some public services. The state constitution, however, bars the de facto establishment under state law of these councils as the local governments of Alaska's villages.

There is still another problem. In making monetary distribution to Native village governments but not to other potential applicants for grants in those villages and in other unincorporated communities, the statute may create equal protection problems by discriminating against the latter without a reasonable basis, if these are responsible parties which are equally capable of providing community services. This problem can be solved by amending the law to open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution. We understand that there are 30 of these communities.

Turning to your specific questions, first to be eligible to participate in the revenue sharing program, the community must meet the statutory requirements, make application, and undertake to expend the money for public purposes on a non-discriminatory basis. Because the contract cannot be enforced in court unless Congress waives the tribal government's sovereign immunity, you

should use forfeiture of the grantee's right to a grant in the following fiscal year as an enforcement mechanism.

Second, state money cannot be expended for the costs of general administration because the village councils and other groups are not public agencies of the state or its political subdivisions. They are, on the one hand, federally recognized and organized tribal entities, and on the other, private associations or corporations. With respect to the former, depending on whether they are organized under section 16, section 17, or both of the Indian Reorganization Act, they are governmental, corporate, or both. In their governmental role, they are tribal. In their corporate role, they are private. All of them can provide public services on a non-discriminatory basis, and to the extent that they do so, a proportional share of their general administrative costs can be paid from state money.

Third, we know of no way to *insure* that the money will be spent for the good of the whole community. Obviously, each recipient must be required to promise that the money will be spent for the good of the entire community and to specify what public services it will provide on a racially non-discriminatory basis. Enforcement will be difficult against a tribal council acting in its governmental capacity under section 16 of the IRA. For that reason, if a section 17 corporation exists, the grant-contract should state that it is with the village council acting in its capacity as a business corporation.

RWP/pjg

cc: Hon. William R. Nix
Commissioner
Department of Public Safety

Daniel W. Hickey
Chief Prosecutor
Juneau AGO - Criminal Section

Exhibit B

MEMORANDUM

State of Alaska

To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: September 2, 1981

FILE NO: J-66-829-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ L Davis
Laura L. Davis
Assistant Attorney General

SUBJECT: State financial aid to benefit unincorporated communities

By your memoranda of May 17 and June 12, 1981, you have asked us to address a number of questions related to state financial assistance to benefit unincorporated communities. First, as to your authority to distribute money to unincorporated villages under AS 29.89.050, we believe that statute to be unconstitutional if read

literally to restrict aid to Native villages. We also believe that the statute may be construed in a constitutional manner by severing the words "Native" and "government" and the definition of "Native village government." Second, with regard to state financial aid to unincorporated communities in general, we will discuss the relevant constitutional principles which apply to the questions you have raised.

AS 29.89 provides for annual revenue sharing with municipalities (for roads, AS 29.89.020), operators of health facilities and hospitals (AS 29.89.030), volunteer fire departments in the unorganized borough (AS 29.89.040), and Native village governments (AS 29.89.050). As discussed in our memorandum of April 27, 1981, aid to Native village governments raises serious issues under (1) article IX, section 6 of the Alaska Constitution which prohibits expenditure of public money unless the expenditure is for a public purpose; (2) article I, section 1, which accords equal protection to all persons; and, (3) article X, section 2, which provides for the exercise of local governmental powers only by cities and boroughs which are incorporated under state law.

We stated that the public purpose requirement was satisfied if the money were used for public benefit, and not for the private benefit of a racially exclusive group. We also indicated that a local organization could receive and spend state money for the benefit of a community without becoming a de facto unit of local government. As to equal protection, we stated that the distribution of state money to a racially exclusive organization did not deny equal protection to persons who are not members of

the organization, if benefits provided with the funds were made available to the public at large.

However, as we noted, the payment of state money under AS 29.89.050 *only* to those unincorporated communities which are identified as Native villages does exclude from participation a number of similarly situated communities which are not Native villages. The first inquiry necessary to determine if a statute is valid under Alaska's equal protection test is whether the statute has a legitimate purpose. *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

Of the three possible purposes for AS 29.89.050 which we have identified, the only legitimate one is to provide public services to residents of unincorporated communities.* If the statutory purpose were illegitimate under the Alaska Constitution, the statute would be unenforceable. There is a heavy presumption in favor of the constitutionality of any statute. SUTHERLAND STATUTORY CONSTRUCTION § 45.11.

* A purpose to benefit Native villages solely because of the racial ancestry of their inhabitants would not be legitimate in the absence of a special motivation such as compensation for loss of aboriginal property rights. No such special motivation appears to be present here. A purpose to encourage the Native villages to assume the responsibilities of local governmental units would be in conflict with article X, section 2, of the constitution, and thus will not be inferred, despite the use of the term "Native village government."

We note that the Act which added AS 29.89 stated no purpose for that chapter, but did state a purpose for adding the general revenue sharing chapter, AS 29.88, as follows:

(Continued on following page)

Assuming that the legislature intended by AS 29.89.050 to provide public services to the residents of unincorporated communities, the means chosen are only loosely suited to that purpose because of the existence in the state of a substantial number of unincorporated communities whose residents would not be benefitted by the literal language of AS 29.89.050. Since the distinction is based upon the racial ancestry of the communities, we might conclude that the statute is unconstitutional despite its legitimate purpose. However, we note that the Alaska Supreme Court has held that a statute which denied equal protection by limiting its application to members of one sex (prohibiting prostitution by females) could be construed as constitutional by severing the offending restrictive language, and thereby expanding application of the statute to all persons. *Plas v. State*, 598 P.2d 966 (Alaska 1979).

The interpretation of AS 29.89.050 presents an analogous problem. The effect of severing the offending restriction to "Native" village "governments," and deleting the definition of that term, is to expand the group of

(Continued from previous page)

It is the purpose of sec. 2 of this Act to

(1) improve the revenue raising and distribution system for the benefit of residents of home rule and general law municipalities by providing for more equitable allocation of financial resources among municipalities to improve their fiscal capacities; and

(2) assure that no municipality suffers impoverishment of necessary public services, relative to other municipalities, because of the chance location of taxable wealth in the state.

eligible communities to include all "villages."* Although this interpretation alters the literal wording of the statute significantly and is, therefore, not to be implemented hastily, *State v. Campbell*, 536 P.2d 105 (Alaska 1975), it does avoid the alternative interpretation that the statute is unconstitutional and void. The law strongly favors the construction of statutes to be consistent with constitutional requirements. *State v. Sundberg*, 611 P.2d 44 (Alaska 1980); *Summers v. Anchorage*, 589 P.2d 863 (Alaska 1979). According to Sutherland:

It has even been said that "a strained construction is not only permissible, but desirable if it is the only construction that will save constitutionality."

SUTHERLAND STATUTORY CONSTRUCTION § 45.11 at 34 (footnote omitted). We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

According to your estimates, the dilution of revenue sharing funds caused by including other unincorporated communities under AS 29.89.050 will not cause significant diminution [sic] in the fund allotments. Further, this interpretation is consistent with the subsequent action of the legislature in providing for grants to all unincorporated communities. 1981 Alaska Sess. L., ch. 60, § 2. We believe that under the circumstances, the Alaska courts would uphold an administrative interpretation of AS

* A parallel deletion of "Native" and "government" from AS 29.89.010(b) is also necessary.

29.89.050 to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry.

A question arises as to the meaning of "village" under AS 29.89.050, in the absence of the language limiting it to a Native village organized under federal law. Generally, a village is any discrete and identifiable place where a group of people reside in close proximity, intend to remain in the place indefinitely, and carry on ordinary human social and economic activities as a community. *Wyandotte Sav. Bank v. Eveland*, 78 N.W.2d 612, 617, 347 Mich. 33; *Union Sav. Bank of Patchogue v. Saxon*, 335 F.2d 718, 721 (D.C. Cir. 1964). Your administrative regulations interpreting and implementing chapter 60, SLA 1981 should provide appropriate guidelines for both that Act and for AS 29.89.050.

Your memorandum of May 17 asked a number of questions regarding your assistance to local governments and to communities in the unorganized borough. Generally, the three constitutional principles discussed above should guide your conduct. You must administer money under your control in order to ensure that it is spent to achieve a public purpose. This requires active supervision of all grants and contracts, especially those transferring money to an organization other than a municipal government. Village and regional Native corporations are not incorporated as cities or boroughs and are not considered to be local governments under state law.

The equal protection provision requires that you administer your programs in order to provide similar treatment for people or organizations which are similarly situated, unless there is a very strong reason for treating

them differently. The distinction between a municipality and an unincorporated village is created by the Alaska Constitution. This different treatment of municipalities is justified because of their status and duties as governmental entities. For example, the state may make general revenue sharing grants to municipalities, to be used at the discretion of the municipal government. The public purpose requirement is met by the operation of state law and the Alaska Constitution controlling the activities of municipal governments. The state may not make general revenue sharing grants to non-governmental entities. In administering the grants to villages under AS 29.89 and to unincorporated communities under chapter 60, SLA 1981, you must ensure that the money is spent to achieve a public purpose.

The local government article of the Alaska Constitution (article X) provides for the exercise of local government powers by cities and boroughs and for the provision of services by multi-purpose service areas. In administering services in the organized borough, the state may contract with any entity capable of providing the needed service, as long as the contractor is actively supervised by the state, and not permitted to become de facto, a local government.

You are not absolutely prohibited by the constitution from contracting for the delivery of services by profit-making corporations or by Native organizations which may have sovereign status, if the services are necessary and no other capable and responsible contractor is available. However, it would be inconsistent with your duties as an administrator of public funds, to contract with these organizations if another more responsible and capable

contractor is available. An entity which may be immune from contract enforcement because of its sovereign status should be considered less responsible to accept a state grant than any corporate entity.

We will defer your request for an authoritative statement of the powers of tribal governments for the time being, and hope that these general guidelines are adequate to resolve your immediate problems.

LLD/pjg

HAROLD M. BROWN
- ATTORNEY GENERAL

James L. Baldwin
Assistant Attorney General
State of Alaska
Department of Law
Pouch K - State Capitol
Juneau, Alaska 99811
Attorneys for Defendants
Telephone: 907-465-3600

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF AKIACHAK,)
NATIVE VILLAGE OF NOATAK,)
AND CIRCLE VILLAGE ON)
BEHALF OF THEMSELVES AND)
ALL OTHERS SIMILARLY)
SITUATED,)

No. A-85-503

Plaintiffs,)

vs.)

ANSWER

EMIL NOTTI, AS COMMISSIONER)
OF DEPARTMENT OF COMMUNITY)
AND REGIONAL AFFAIRS, STATE)
OF ALASKA,)

Defendants.)

The Defendants Emil Notti, Commissioner of the Alaska Department of Community and Regional Affairs, and the State of Alaska for their answer allege as follows:

JURISDICTION AND VENUE

1. Defendants deny the allegations set out in paragraph 1 of plaintiffs' complaint. Defendants allege that the court should defer to the jurisdiction of the Alaska Superior Court which is considering claims in *Circle Village v. Smith*, No. 4FA-85-1197 CIV. (Alaska Super., May 31, 1985), which are similar to those presented to this court.

NATURE OF THE ACTION

2. Defendants admit the allegations contained in the first sentence of paragraph 2. Defendants deny the allegations contained in the second sentence of paragraph 2 that plaintiffs represent a class of similarly situated individuals. The remaining allegations set out in paragraph 2 are conclusions of law which require no response.

PARTIES

3. Defendants deny the allegations set out in paragraph 3 and allege that under state law Akiachak is a second class city organized under AS 29, Noatak is an unincorporated community within the unorganized borough and that both communities are not situated within an Indian reservation. Defendants deny that Noatak Village is a government or that governmental status is necessary to receive revenue sharing payments.

4. Defendants admit that Circle Village is an unincorporated community in the unorganized borough. Defendants deny that the Circle Village traditional village

council is a government or that governmental status is necessary to receive state revenue sharing payments.

5. Defendants admit the allegations set out in paragraph 5.

CLASS ACTION ALLEGATIONS

6. Defendants lack sufficient knowledge to admit or deny the allegations set out in paragraphs 6 - 11 of plaintiffs' complaint.

GENERAL ALLEGATIONS

12. The defendants allege that the allegations set out in paragraph 12 are conclusions of law which require no response.

13. Defendants deny the allegations set out in paragraph 13 of plaintiffs' complaint to the extent that entities purporting to have governmental status operating in the vicinity of Noatak and Circle Village entitle those communities to benefits provided by state law in any manner different from other unincorporated communities in the state.

14. Defendants admit that the City of Akiachak has petitioned to the Local Boundary Commission for dissolution of its municipal corporation. The defendants lack sufficient knowledge to admit or deny the remaining allegations set out in paragraph 14.

15. Defendants deny the allegations set out in the first sentence of paragraph 15 that defendant Notti has denied plaintiffs benefits under the state revenue sharing

program. Defendants allege that plaintiffs have been paid a pro rata share of available appropriations made to finance this function. Defendants lack sufficient knowledge to admit or deny the allegations set out in the second sentence of paragraph 15. Defendants deny the allegations set out in the third sentence of paragraph 15 and allege that any construction of AS 29.89.010 and 29.89.050 applied by defendants is based on the fact that all unincorporated communities in the state must be treated equally. The defendants admit the remaining allegations set out in paragraph 15.

16. The defendants deny the allegations set out in paragraph 16.

17. Defendants deny the allegations set out in paragraph 17 of plaintiffs' complaint.

18. Defendants admit that in every year since July 1, 1980, defendant Notti has paid each revenue sharing recipient a pro rata share of appropriations made by law to finance the revenue sharing program. Defendants specifically deny that revenue sharing payments are "entitlements" and also deny the remainder of the allegations set out in paragraph 18.

19. Defendants assert that the allegations set out in paragraph 19 of plaintiffs' complaint are conclusions of law which require no response.

FIRST CAUSE OF ACTION

20. Defendants allege that action taken to reduce plaintiffs' revenue sharing payments was based on considerations other than the racial ancestry of plaintiffs. The

defendants deny the remaining allegations set out in paragraph 20.

SECOND CAUSE IF ACTION

21. Defendants contend the allegations set out in paragraph 21 are conclusions of law which require no response.

THIRD CAUSE OF ACTION

22. Defendants contend the allegations set out in paragraph 22 are conclusions of law which require no response.

FOURTH CAUSE OF ACTION

23. Defendants contend the allegations set out in paragraph 23 are conclusions of law which require no response.

PENDENT JURISDICTION OF STATE CLAIMS

24. Defendants allege that Causes of Action five through eight are not appropriate for the exercise of federal jurisdiction. Defendants deny the allegations set out in paragraph 24.

FIFTH CAUSE OF ACTION

25. Defendants deny the allegations set out in paragraph 25 of plaintiffs' complaint.

SIXTH CAUSE OF ACTION

26. Defendants assert that the allegations set out in paragraph 26 are conclusions of law which require no response.

SEVENTH CAUSE OF ACTION

27. Defendants assert that the allegations set out in paragraph 27 are conclusions of law which require no response.

EIGHTH CAUSE OF ACTION

28. Defendants deny that any action complained of by plaintiffs was taken based on the racial ancestry of plaintiffs. Defendants assert the remaining allegations set out in paragraph 28 are conclusions of law which require no response.

29. Defendants deny each allegation set out in the complaint which have not been specifically admitted.

AFFIRMATIVE DEFENSE

1. Plaintiffs are barred from obtaining injunctive relief because they have failed to assert their claims in a timely manner.

PRAYER FOR RELIEF

Defendants prays this honorable court to

1. give plaintiffs nothing;

2. deny plaintiffs the relief requested in paragraphs 1 - 8 of their prayer for relief;

3. award defendants their costs and attorney fees; and

4. grant defendants other relief the court considers just.

DATED: September 26, 1985.

HAROLD M. BROWN
ATTORNEY GENERAL

By: /s/ James L. Baldwin
James L. Baldwin
Assistant Attorney General

By: /s/ Susan D. Cox
Susan D. Cox
Assistant Attorney General

EXHIBIT A

AFFIDAVIT OF MARTY RUTHERFORD
Civil Action No. A85-503HAROLD M. BROWN
ATTORNEY GENERALDouglas K. Mertz
Assistant Attorney General
State of Alaska
Department of Law
P. O. Box K - State Capitol
Juneau, Alaska 99811
Attorneys for Plaintiff [sic - Defendants]IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKANATIVE VILLAGE OF AKIACHAK,)
NATIVE VILLAGE OF NOATAK,) Civil Action
AND CIRCLE VILLAGE ON) No. A85-503
BEHALF OF THEMSELVES AND)
ALL OTHERS SIMILARLY) AFFIDAVIT OF
SITUATED,) MARTY
Plaintiffs,) RUTHERFORD

vs.)

EMIL NOTTI, AS COMMISSIONER)
OF DEPARTMENT OF)
COMMUNITY AND REGIONAL)
AFFAIRS, STATE OF ALASKA,)
Defendants.)STATE OF ALASKA)
FIRST JUDICIAL DISTRICT)

ss.

I, Marty Rutherford, being first duly sworn upon
oath, deposes and says:

1. I am Director of the Division of Municipal and Regional Assistance of the Alaska Department of Community and Regional Affairs. My division's responsibilities include administration of the aid to unincorporated communities program under Alaska Statute 29.60.140 (formerly AS 29.89.050). I am familiar with the history of the program and how it has been administered by this department.
2. The program was created by the Alaska Legislature in 1980 and first implemented in Fiscal Year 1981. During 1981 the department received advice from the Attorney General's Office that the program violated the Alaska Constitution by limiting disbursements to only those unincorporated communities with "Native Village governments." (See the attached memoranda from the Attorney General's Office, Exhibits A-1, A-2, and A-3.) The department then decided, again with the advice of the Attorney General, to expand the program to include all unincorporated communities. The expansion did not begin immediately, with the FY 82 disbursements, since the 1981 Alaska Legislature had appropriated funds for FY 82 only for the Native communities. The Department included in its budget request to the 1982 legislature (for the FY 83 budget) a notification that the Attorney General had recommended expansion of the program to cover all unincorporated communities and the expanded number of applications we anticipated receiving as a result. (Exhibit A-4). The legislature appropriated funds for the expanded programs for FY 83 and has for each subsequent year. (Attached are our budget requests for those

years describing the expanded program and the expanded number of recipients, and our annual reports to the legislature listing the actual recipients and the amounts received. (Exhibit A-5).

3. In 1985 the Legislature rewrote the municipal code (Title 29) and as part of the rewrite repealed AS 29.89.050. It replaced that statute with AS 29.60.140, which requires exactly the same program as we had been carrying out since FY 83. all unincorporated communities are eligible, with the funds being administered by either a Native council or a nonprofit corporation. The new statute became effective on January 1, 1986, and we assumed that FY 86 funds were to come under it, not under the repealed statute, since actual disbursements are given out in the spring (except for limited advance payments), after the new law became effective. Of course the new statute requires exactly what we had been doing since FY 83, so there was no real impact on our program administration.

4. The legislature has never fully funded this program, either before or after the expansion. Each year the legislature makes a lump sum appropriation for all of the department's revenue-sharing program, with an allocation of part of it to the "Miscellaneous Services Account" set up in AS 29.60.170 (former AS 29.89.080). That account funds the following payments:

- roads at \$2,500 per mile (AS 29.60.110(a), formerly AS 29.89.020(a));
- ice roads at \$1,500 per mile (AS 29.60.110(b), formerly AS 29.89.020(b));

- hospitals at \$250,000 per facility over 10 beds (AS 29.60.120(a)(1), formerly AS 29.89.030(a)(1));
- health facilities at \$2,000 per bed (AS 29.60.120(a)(3), formerly AS 29.89.030(a)(3));
- volunteer fire departments at \$10 per person served in the unorganized borough (AS 29.60.130, formerly AS 29.89.040);
- unincorporated communities at \$25,000 per community (AS 29.60.140, formerly Native village governments under AS 29.89.050).

Each of those programs has a separate "entitlement" figure, similar to the \$25,000 figure in AS 29.60.140 (and former AS 29.89.050). Since the total entitlements in any one year under these programs generally exceeds the appropriations, the legislature requires a pro rata distribution among all eligible recipients (AS 29.60.170 and former AS 29.89.080). So each year the department totals the statutory entitlements under all of these programs, divides that figure into the total lump sum appropriation for the programs, and derives a percentage figure which is the pro rata share of the entitlement received by each program recipient. As a result, communities eligible under AS 29.60.140 (and former AS 29.89.050) have received less than the statutory \$25,000 each year of the program because of the budgetary shortfall. The actual disbursement to each community each year of the program has been as follows:

| | |
|-------|----------|
| FY 81 | \$21,079 |
| FY 82 | \$23,194 |
| FY 83 | \$19,933 |

| | |
|-------|----------|
| FY 84 | \$21,037 |
| FY 85 | \$23,104 |
| FY 86 | \$22,785 |

4. To my knowledge the only reason the legislature has short-funded this program is ordinary fiscal conservatism, as reflected by cutbacks in almost all our budgetary requests. I know of no evidence that any shortfall in any year occurred because the legislature intended to fund only Native villages. On the contrary, since the program was expanded in 1983 it has been clear that the legislature intended to provide funds to all unincorporated communities.

5. No one brought any legal challenge to the department's expansion of the program until 1985, when the Circle Village Council filed an administrative appeal in the Alaska Superior Court and when this lawsuit was filed. No recipient other than the Circle Village Council pursued any administrative remedy or filed an administrative appeal.

6. Circle Village Council did not apply for funds under the program in FY 83, FY 84, or FY 86, but did apply for FY 85. An application for FY 85 was also received from the Circle Civic Community Association, a local nonprofit group which received the program funds in FY 83, 84, and 86. (After a hearing and investigation the FY 85 funds were split between the two organizations. See exhibit A-6).

Akiachack is an incorporated city and so is ineligible for the aid to unincorporated community program, nor has it applied for funds. In response to a community

inquiry, however Commissioner Notti advised the community in February, 1986 that it was not eligible for municipal assistance due to its failure to meet technical requirements for cities under AS 29.60.290(1)-(3). He concluded that Akiachak would be eligible for unincorporated community aid, however. But in March, 1986, after consulting counsel, the commissioner concluded that since Akiachak's petition to dissolve its municipal incorporation had been unsuccessful, it could not be considered eligible for aid to unincorporated communities.

7. All funds for the unincorporated community program for FY 85 and earlier years have been disbursed. Payments for FY 86 have been sent out, except that, on the court's order, we held back \$30,037 from the non-Native communities in case the court rules that they are entitled to additional funds. (By our calculations, if the court found that the 49 Native village applicants for FY 86 funds were to receive more money to bring them up to the level they would be at without non-Native village participation, each village would receive an extra \$613.)

This money is being held back from the entitlements of the 23 communities from which entities other than Native councils applied. Those communities are:

- | | |
|----------------|----------------------|
| * Cantwell | Kenny Lake |
| Big Delta | * Manley Hot Springs |
| Central | McKinley Park |
| Coffman Cove | Paxson |
| * Copper River | Point Baker |
| * Circle | Port Protection |
| Edna Bay | * Red Devil |
| * Egegik | * Sleetmute |
| Elfin Cove | * Takotna |
| * False Pass | Tok |
| Gustavus | Healy |
| Hyder | |

(The communities marked with an asterix [sic] have some form of Native council, but the Native council did not apply for the funds; instead a community nonprofit group applied.)

DATED: 7-10-86

/s/ Marty Rutherford

SUBSCRIBED AND SWORN TO before me this 10th day of July, 1986.

ROBERT S. MEANS
NOTARY PUBLIC
STATE OF ALASKA

/s/ Robert S Means
Notary Public, State of Alaska
My commission expires: 8-8-86

EXHIBIT A-1

to

Affidavit of Marty Rutherford

Civil Action No. A85-503

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 15, 1981

Hon. Ramona L. Barnes
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Grants to unincorporated
communities

Dear Representative Barnes:

This responds to your request for advice on the constitutionality of limiting revenue sharing for unincorporated communities to those organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C.A. § 476 (1963), or eligible as a Native Village under the Alaska Native Claims Settlement act (ANCSA), 43 U.S.C.A. § 1611.

We believe that the limitation may well be unconstitutional under the equal protection clause of the state constitution. Alaska Const., art. I, § 1.

According to the Department of Community and Regional Affairs, there are 30 unincorporated communities outside of organized boroughs, with a population

of 3,867 people, which are not IRA or ANCSA villages. These include, for example, Tok, Big Delta, Chicken, Dunbar, Elfin Cove, Evansville, Glenallen, Gustavus, Healy, Hyder, McKinley Park, Point Baker, Thorne Bay, Two Rivers, and Whale Pass.

To meet equal protection requirements, the basis for distinguishing between unincorporated communities must bear a reasonable relationship to a legitimate governmental goal. The goal is to provide public benefits in the form of facilities and services made available to the public at large on a nondiscriminatory basis. That can be done by any identifiable, responsible local group which, given the grant, is ready, willing, and able to do so. This is precisely how the program for rural development assistance works under AS 44.47.130. Accordingly, limiting grantees to tribal councils appears to have no reasonable basis, and therefore, may violate the equal protection clause. It is this limitation which runs afoul of the constitution, not the categorical grants themselves.

The proper corrective action is to amend the revenue sharing legislation to enlarge the class of beneficiaries.

Sincerely yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: /s/ Rodger W Pegues
Rodger W. Pegues
Assistant Attorney General

RWP/pjs

EXHIBIT A-2

to
Affidavit of Marty Rutherford

Civil Action No. A85-503

MEMORANDUM

State of Alaska

TO: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: April 27, 1981

FILE NO: J-66-335-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ R W P
Rodger W. Pegues
Assistant Attorney General

SUBJECT: State revenue sharing with IRA councils and traditional councils, chiefs, or other governing bodies

You have asked for additional advice on this subject.

Under AS 29.89.050, the state pays \$25,000 annually to a "Native village government for a village which is not incorporated as a city" The term is defined as a local governing body organized under section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (1963) which was applied to Alaska by the Act of May 1, 1936, 25 U.S.C.A.

§ 473a (1963),* or as a traditional village council, paramount chief, or other governing body of a village.

This statute creates serious constitutional problems. If the money is not expended by the recipient to provide public services in a racially non-discriminatory manner, the public purpose clause** and the equal protection clause*** of the Alaska Constitution will have been violated. *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963). The test, however, is not the racial or religious character of the recipient but the character of the use to which the money will be put. *Id.* And the courts will look at the entire factual and governmental context on a case-by-case basis to determine whether the expenditure serves a public purpose. *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970). Accordingly, the constitutional provisions which require a public purpose and equal protection will not be offended so long as the services provided by a village council are furnished on a non-discriminatory basis.

A much less easily resolved problem lies in another provision of the Alaska Constitution, article X, section 2:

All local government power shall be vested in boroughs and cities. The State may delegate

* There is a question whether any section 16 tribal organization, other than the Metlakatla Indian Community Annette Islands Reserve, Alaska, still exercises governmental powers after the enactment of the Alaska Native Claims Settlement Act.

** Alaska Const., art. IX, § 6. "No tax shall be levied, or appropriation of public money made, or public property transferred . . . except for a public purpose."

*** Alaska Const., art. I, § 1; U.S. Const., Amend. XIV, § 1.

taxing powers to organized boroughs and cities only.

This limitation of "local government power" to boroughs and cities is preceded by a purpose clause which states:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

The record of the debates at the Constitutional Convention makes it clear beyond reasonable doubt that this three-fold statement of purpose and construction precisely and concisely sums up the essence of the article on local government and the intent of its framers. The framers perceived three evils hobbling local government in Alaska and elsewhere: One, there were a multiplicity of overlapping, special (often single) purpose districts, each little known to the average voter and each monomaniacally pursuing its own goals in disregard and often in conflict with other special purpose districts occupying the same, or part of the same, area. Two, many of these districts operated on revenues from special purpose projects, for example sewage disposal districts. Others levied taxes. Their single purpose orientation, lack of centralized control and responsibility, distance from any meaningful relationship to the voters, and lack of any need to compete for a share of an integrated budget made tax levies and expenditures excessive and irrational. Three, the courts had hobbled local governments with general rules for construing their powers under which local governments could not respond to pressing needs because they could not find some express provision of a statute or

charter which gave them the power to act on the subject. The framers crafted article X to cure or remove all three evils. *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543-545 (Alaska 1962).

The provisions of article X carry out the framers purposes. They prescribe that a "liberal construction shall be given to the powers of local government units." Alaska Const., art. I, § 1. They limit local government powers to cities and boroughs. *Id.*, § 2. They allow the legislature to delegate taxing power to boroughs and cities only. *Id.* They prohibit new special districts ("service areas") from being established "if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city." *Id.*, § 5. The adoption of home rule charters is placed in the hands of local voters, *id.*, § 9, and home rule local governments have all powers not prohibited by law or charter. *Id.*, § 11. Finally, to make boundary changes, including mergers, as easy as possible, a state commission is empowered to change them, subject only to a two-house veto by the legislature. *Id.*, § 12. In other words, if the constitution is followed, none of the three evils the framers sought to cure and avoid can exist in Alaska.

The use of traditional village councils or IRA councils to provide local government services is at odds with the constitution's provisions on local government. The public services they would perform are those which local governments perform. The Alaska Constitution limits the exercise of those powers by political subdivisions of the state to boroughs and cities. The tribal councils are neither. If they are duly organized under section 16 of the

Act, 25 U.S.C.A. 476 (1963), they are tribal governments with sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127 (D. Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Financing a broad range of tribal government activities on the part of the councils is not for a public purpose of the state. Financing a broad range of non-tribal, local government activities through the councils would effectively raise them to the status of local governments. That conflicts with the constitutional mandate that the legislature may only use cities or boroughs to provide local government, and it indubitably removes any incentive - or even any rational basis - for a village to incorporate as a city. It would also have the practical effect of creating or sanctioning a racially exclusive de facto local government under color of state law, which is the reason that tribal councils cannot be designated by the state to be cities or local governments. Under the Equal Protection Clause, the state cannot set up racially exclusive political subdivisions.

This is not to say that the state cannot contract with a racially (or religiously) exclusive group to provide public services or manage a public facility on a non-discriminatory basis for all the residents of a community. On a limited basis, therefore, grants can be made to IRA councils in their capacity as business corporations to provide some public services. The state constitution, however, bars the de facto establishment under state law of these councils as the local governments of Alaska's villages.

There is still another problem. In making monetary distribution to Native village governments but not to other potential applicants for grants in those villages and

in other unincorporated communities, the statute may create equal protection problems by discriminating against the latter without a reasonable basis, if these are responsible parties which are equally capable of providing community services. This problem can be solved by amending the law to open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution. We understand that there are 30 of these communities.

Turning to your specific questions, first to be eligible to participate in the revenue sharing program, the community must meet the statutory requirements, make application, and undertake to expend the money for public purposes on a non-discriminatory basis. Because the contract cannot be enforced in court unless Congress waives the tribal government's sovereign immunity, you should use forfeiture of the grantee's right to a grant in the following fiscal year as an enforcement mechanism.

Second, state money cannot be expended for the costs of general administration because the village councils and other groups are not public agencies of the state or its political subdivisions. They are, on the one hand, federally recognized and organized tribal entities, and on the other, private associations or corporations. With respect to the former, depending on whether they are organized under section 16, section 17, or both of the Indian Reorganization Act, they are governmental, corporate, or both. In their governmental role, they are tribal. In their corporate role, they are private. All of them can provide public services on a non-discriminatory basis, and to the extent that they do so, a proportional share of

their general administrative costs can be paid from state money.

Third, we know of no way to *insure* that the money will be spent for the good of the whole community. Obviously, each recipient must be required to promise that the money will be spent for the good of the entire community and to specify what public services it will provide on a racially non-discriminatory basis. Enforcement will be difficult against a tribal council acting in its governmental capacity under section 16 of the IRA. For that reason, if a section 17 corporation exists, the grant-contract should state that it is with the village council acting in its capacity as a business corporation.

RWP/pjs

cc: Hon. William R. Nix
Commissioner
Department of Public Safety

Daniel W. Hickey
Chief Prosecutor
Juneau AGO - Criminal Section

EXHIBIT A-3
to
Affidavit of Marty Rutherford
 Civil Action No. A85-503

MEMORANDUM State of Alaska
 To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs
 ATTN: Palmer McCarter, Director Div. of Local Gov't Asst
 DATE: September 2, 1981
 FILE NO: J-66-829-81
 TELEPHONE NO: 465-3600
 FROM: WILSON L. CONDON
 ATTORNEY GENERAL
 BY: /s/ L Davis
 Laura L. Davis
 Assistant Attorney General
 SUBJECT: State financial aid to benefit unincorporated communities

By your memoranda of May 17 and June 12, 1981, you have asked us to address a number of questions related to state financial assistance to benefit unincorporated communities. First, as to your authority to distribute money to unincorporated villages under AS 29.89.050, we believe that statute to be unconstitutional if read literally to restrict aid to Native villages. We also believe that the statute may be construed in a constitutional manner by severing the words "Native" and "government" and the definition of "Native village government."

Second, with regard to state financial aid to unincorporated communities in general, we will discuss the relevant constitutional principles which apply to the questions you have raised.

AS 29.89 provides for annual revenue sharing with municipalities (for roads, AS 29.89.020), operators of health facilities and hospitals (AS 29.89.030), volunteer fire departments in the unorganized borough (AS 29.89.040), and Native village governments (AS 29.89.050). As discussed in our memorandum of April 27, 1981, aid to Native village governments raises serious issues under (1) article IX, section 6 of the Alaska Constitution which prohibits expenditure of public money unless the expenditure is for a public purpose; (2) article I, section 1, which accords equal protection to all persons; and, (3) article X, section 2, which provides for the exercise of local governmental powers only by cities and boroughs which are incorporated under state law.

We stated that the public purpose requirement was satisfied if the money were used for public benefit, and not for the private benefit of a racially exclusive group. We also indicated that a local organization could receive and spend state money for the benefit of a community without becoming a de facto unit of local government. As to equal protection, we stated that the distribution of state money to a racially exclusive organization did not deny equal protection to persons who are not members of the organization, if benefits provided with the funds were made available to the public at large.

However, as we noted, the payment of state money under AS 29.89.050 *only* to those unincorporated communities which are identified as Native villages does exclude from participation a number of similarly situated communities which are not Native villages. The first inquiry necessary to determine if a statute is valid under Alaska's equal protection test is whether the statute has a legitimate purpose. *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

Of the three possible purposes for AS 29.89.050 which we have identified, the only legitimate one is to provide public services to residents of unincorporated communities.* If the statutory purpose were illegitimate

* A purpose to benefit Native villages solely because of the racial ancestry of their inhabitants would not be legitimate in the absence of a special motivation such as compensation for loss of aboriginal property rights. No such special motivation appears to be present here. A purpose to encourage the Native villages to assume the responsibilities of local governmental units would be in conflict with article X, section 2, of the constitution, and thus will not be inferred, despite the use of the term "Native village government."

We note that the Act which added AS 29.89 stated no purpose for that chapter, but did state a purpose for adding the general revenue sharing chapter, AS 29.88, as follows:

It is the purpose of sec. 2 of this Act to

(1) improve the revenue raising and distribution system for the benefit of residents of home rule and general law municipalities by providing for more equitable allocation of financial resources among municipalities to improve their fiscal capacities; and

(2) assure that no municipality suffers impoverishment of necessary public services, relative to other municipalities, because of the chance location of taxable wealth in the state.

under the Alaska Constitution, the statute would be unenforceable. There is a heavy presumption in favor of the constitutionality of any statute. SUTHERLAND STATUTORY CONSTRUCTION § 45.11.

Assuming that the legislature intended by AS 29.89.050 to provide public services to the residents of unincorporated communities, the means chosen are only loosely suited to that purpose because of the existence in the state of a substantial number of unincorporated communities whose residents would not be benefitted by the literal language of AS 29.89.050. Since the distinction is based upon the racial ancestry of the communities, we might conclude that the statute is unconstitutional despite its legitimate purpose. However, we note that the Alaska Supreme Court has held that a statute which denied equal protection by limiting its application to members of one sex (prohibiting prostitution by females) could be construed as constitutional by severing the offending restrictive language, and thereby expanding application of the statute to all persons. *Plas v. State*, 598 P.2d 966 (Alaska 1979).

The interpretation of AS 29.89.050 presents an analogous problem. The effect of severing the offending restriction to "Native" village "governments," and deleting the definition of that term, is to expand the group of eligible communities to include all "villages."* Although this interpretation alters the literal wording of the statute significantly and is, therefore, not to be implemented

* A parallel deletion of "Native" and "government" from AS 29.89.010(b) is also necessary.

hastily, *State v. Campbell*, 536 P.2d 105 (Alaska 1975), it does avoid the alternative interpretation that the statute is unconstitutional and void. The law strongly favors the construction of statute to be consistent with constitutional requirements. *State v. Sundberg*, 611 P.2d 44 (Alaska 1980); *Summers v. Anchorage*, 589 P.2d 863 (Alaska 1979). According to Sutherland:

It has even been said that "a strained construction is not only permissible, but desirable if it is the only construction that will save constitutionality."

SUTHERLAND STATUTORY CONSTRUCTION § 45.11 at 34 (footnote omitted). We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

According to your estimates, the dilution of revenue sharing funds caused by including other unincorporated communities under AS 29.89.050 will not cause significant diminution [sic] in the fund allotments. Further, this interpretation is consistent with the subsequent action of the legislature in providing for grants to all unincorporated communities. 1981 Alaska Sess. L., ch. 60, § 2. We believe that under the circumstances, the Alaska courts would uphold an administrative interpretation of AS 29.89.050 to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry.

A question arises as to the meaning of "village" under AS 29.89.050, in the absence of the language limiting it to a Native village organized under federal law. Generally, a village is any discrete and identifiable place where a group of people reside in close proximity, intend

to remain in the place indefinitely, and carry on ordinary human social and economic activities as a community. *Wyandotte Sav. Bank v. Eveland*, 78 N.W.2d 612, 617, 347 Mich. 33; *Union Sav. Bank of Patchogue v. Saxon*, 335 F.2d 718, 721 (D.C. Cir. 1964). Your administrative regulations interpreting and implementing chapter 60, SLA 1981 should provide appropriate guidelines for both that Act and for AS 29.89.050.

Your memorandum of May 17 asked a number of questions regarding your assistance to local governments and to communities in the unorganized borough. Generally, the three constitutional principles discussed above should guide your conduct. You must administer money under your control in order to ensure that it is spent to achieve a public purpose. This requires active supervision of all grants and contracts, especially those transferring money to an organization other than a municipal government. Village and regional Native corporations are not incorporated as cities or boroughs and are not considered to be local governments under state law.

The equal protection provision requires that you administer your program in order to provide similar treatment for people or organizations which are similarly situated, unless there is a very strong reason for treating them differently. The distinction between a municipality and an unincorporated village is created by the Alaska Constitution. This different treatment of municipalities is justified because of their status and duties as governmental entities. For example, the state may make general revenue sharing grants to municipalities, to be used at the discretion of the municipal government. The public purpose requirement is met by the operation of state law

and the Alaska Constitution controlling the activities of municipal governments. The state may not make general revenue sharing grants to non-governmental entities. In administering the grants to villages under AS 29.89 and to unincorporated communities under chapter 60, SLA 1981, you must ensure that the money is spent to achieve a public purpose.

The local government article of the Alaska Constitution (article X) provides for the exercise of local government powers by cities and boroughs and for the provision of services by multi-purpose service areas. In administering services in the unorganized borough, the state may contract with any entity capable of providing the needed service, as long as the contractor is actively supervised by the state, and not permitted to become de facto, a local government.

You are not absolutely prohibited by the constitution from contracting for the delivery of services by profit-making corporations or by Native organizations which may have sovereign status, if the services are necessary and no other capable and responsible contractor is available. However, it would be inconsistent with your duties as an administrator of public funds, to contract with these organizations if another more responsible and capable contractor is available. An entity which may be immune from contract enforcement because of its sovereign status should be considered less responsible to accept a state grant than any corporate entity.

We will defer your request for an authoritative statement of the powers of tribal governments for the time

being, and hope that these general guidelines are adequate to resolve your immediate problems.

LLD/pjg

NATIVE VILLAGE OF NOATAK; Circle Village, Plaintiffs-Appellants,

and

Native Village of Akiachak, Plaintiff,

v.

David HOFFMAN, as Commissioner, Department of Community and Regional Affairs, State of Alaska, Defendant-Appellee.

Nos. 87-4310, 87-4374.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1988.

Decided March 30, 1989.

Native villages brought federal and state claims against Alaskan official seeking order directing that he pay over revenue sharing monies appropriated by legislature and prohibiting him from diluting villages' share in violation of federal law. The United States District Court for the District of Alaska, Andrew J. Kleinfeld, J., dismissed action for lack of subject-matter jurisdiction, and two native villages appealed. The Court of Appeals, Noonan, J., held that: (1) both tribes were "duly recognized" within meaning of statute conferring federal question jurisdiction on federal district courts over civil actions brought by tribes "duly recognized" by Secretary of Interior; (2) Alaska's sovereign immunity from native villages' suit was overridden by congressional action, inasmuch as United States could sue as trustee on behalf of villages and thus villages could sue on their own behalf; (3) villages properly invoked federal subject-matter jurisdiction by alleging that Commissioner violated

federal laws and policies intended to further tribal self-government by expanding class of eligible recipients of legislative appropriation to include entities other than native villages.

Reversed and remanded.

Kozinski, Circuit Judge, filed dissenting opinion.

Lawrence A. Aschenbrenner and Robert T. Anderson, Anchorage, Alaska, for plaintiffs-appellants.

Gary I. Amendola and Douglas K. Mertz, Asst. Attys. Gen., Juneau, Alaska, for defendant-appellee Hoffman.

Appeal from the United States District Court for the District of Alaska.

Before KOZINSKI, NOONAN and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

The Native Village of Noatak, the Native Village of Akiachak and Circle Village brought this action against the Commissioner of the Department of Community and Regional Affairs of the State of Alaska (the Commissioner). The district court dismissed the case for want of jurisdiction. The Native Village of Noatak and Circle Village (the Native Villages) appeal to this court. We reverse and remand.

The Parties

Noatak is a government with a local governing board organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* Circle Village has a tradition Council form of

government. The defendant Commissioner is the principal officer of a department of the state of Alaska, responsible for administering the payment of revenue-sharing funds.

The Causes of Action

The Native Villages allege that they have been authorized to receive their pro rata share of the funds appropriated by the Alaska Legislature, up to \$25,000 in accordance with Alaska Stat. §§ 29.89.010 and 29.89.050, which provided, "the state shall pay \$25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050 (1980). The plaintiffs allege that the Commissioner deliberately expanded the class of eligible recipients to include entities other than the Native Villages solely because of the racial ancestry of the individual members of the villages, in violation of the federal Constitution of 42 U.S.C. § 1983 and of federal common law authorizing discrete treatment of Indian tribes, with the result that their share was diluted.

As a second cause of action the Native Villages assert that in so diluting the funds available the Commissioner violated federal laws and policy intended to further tribal self-government, including the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; the Indian Health Care Improvement Act, 25 U.S.C.

§§ 1601-1680 and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*

As a third cause of action the Native Villages allege that the Commissioner's conduct also violated 25 U.S.C. § 476, which, they contend, grants native tribes the unrestricted right to contract with states. As a fourth cause of action the Native Villages claim that the Commissioner's conduct violated the First Amendment by destroying native culture and therefore their most basic form of expression, religion and association. Four additional claims are put forward as pendent state claims. The plaintiffs seek an order directing the Commissioner to pay over the monies appropriated by the Legislature and an injunction prohibiting further administration of the statute in a way that would preclude the plaintiffs from receiving a full share.

Proceedings

The district court held that the court did not have jurisdiction because the plaintiffs' suit was barred by the eleventh amendment or because, in the alternative, the case did not arise under the Constitution, laws or treaties of the United States. This appeal followed.

Analysis

1. *The Sovereign Immunity of the State of Alaska*

The Commissioner contends that the eleventh amendment was properly applied by the district court to deny jurisdiction. The eleventh amendment by its terms does not bar suit in the federal courts against a state by

its own citizens. In *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), it was held that a state could not be sued by one of its own citizens seeking to make it perform its contracts but that "any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted." *Id.* at 20-21, 10 S.Ct. at 509. The opinion appears to rest as much on a reading of Article III of the Constitution as on a judicial expansion of the terms of the eleventh amendment. Nonetheless since the date of its decision it has been customary to think of *Hans* as extending the eleventh amendment to bar suits against a state by its own citizens. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The continued vitality of *Hans* is in question, both by reason of the arguments directed against it and by the actual vote in *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). With the court divided four to four and Justice Scalia declaring that he was unwilling to address *Hans*, it is not clear how long *Hans* will remain good law. We are, however, obliged to apply *Hans* in this case.

Whether the eleventh amendment bars an Indian tribe from suing a state is not apparent from its text, which refers only to suits against a state by citizens of another state or of a foreign state. The fundamental opinion of Chief Justice Marshall holds that an Indian tribe is not a foreign state that could bring a suit in the Supreme Court under Article III of the Constitution; rather, Indian tribes are "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). By the same reasoning an Indian tribe is not embraced within

the literal language of the eleventh amendment. On the other hand, the structure of the opinion in *United States v. Minnesota*, 270 U.S. 181, 193, 46 S.Ct. 298, 300, 70 L.Ed. 539 (1926), points to a bar against suit by an Indian tribe. But *Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983), indicates that the matter is still open. We assume without deciding that the state does enjoy immunity unless it has been overridden by action of the United States.

2. Congressional Action Overriding the Sovereignty of Alaska.

28 U.S.C. § 1362 provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Two questions arise as to the applicability of this statute. The first is whether the Native Villages have been "duly recognized by the Secretary of the Interior." The Native Villages represent bodies of Indians of the same race united in a community under a single government in a particular territory - Noatak at Bering Strait, Circle Village at Upper Yukon - Porcupine. They therefore meet the basic criteria to constitute Tribes. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359-60, 45 L.Ed. 521 (1901).

No statute expressly outlines how a tribe may become duly recognized for purposes of § 1362 jurisdiction. In *Price v. State of Hawaii*, 764 F.2d 623, 626 (9th

Cir.1985), this court left open the question whether formal organization or incorporation of a tribe followed by approval of the organization or incorporation by the Secretary of the Interior constituted being "duly recognized" for the purpose of the statute. We see no reason to suppose that the Secretary of the Interior needs to issue a special document conferring a right to sue under the statute. Noatak Village has a governing body approved by the Secretary. 25 U.S.C. § 476. It is therefore a tribe with a duly recognized governing body and qualifies for the benefits of § 1362.

Circle Village, like Noatak, is listed as a Native Village in the Alaska Native Claims Act, 43 U.S.C. § 1610(b)(1). The purpose of this Act was to make "a fair and just settlement of all claims by Natives and Native Groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). The Villages acknowledged by the Act were distinguished from ineligible villages "of a modern and urban character," where the majority of the residents were not natives. 43 U.S.C. § 1610(b)(2), (3). The Villages acknowledged by the Act were possessed of aboriginal land claims and became eligible for the benefits provided under the Act. The Act was congressional recognition of the Native Villages.

In addition, in three recently enacted statutes – the Indian Self-Determination Act, 25 U.S.C. § 450(b); the Indian Financing Act, 25 U.S.C. § 1452(c), and the Indian Child Welfare Act, 25 U.S.C. § 1903(8) – Congress treated the Native villages as Indian tribes. Arguably, Congress intended to confer recognition only for the particular purposes of each piece of legislation. See, e.g., *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1386-87 (9th

Cir.1988) (recognition under Indian Reorganization Act not conclusive as to tribal status). But the nature and scope of the federal government's relationship with the Native Villages, as evidenced by these Acts, indicates that the recognition extends to legal claims.

It is true that § 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Circle Village, as well as Noatak, qualifies under § 1362.

The second question presented as to § 1362 is whether in this case, assuming a federal question is presented, the statute overrides the immunity of the state. The Second Circuit has recognized the statute as containing a broad grant of jurisdiction over federal question suits brought by tribes. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1080 (2d Cir.1982). To the contrary is the Eighth Circuit *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir.1974).

For the Eighth Circuit, Judge Webster reasoned that the only purpose of the statute was to let tribes sue to protect "their federally derived property rights," and that, to obtain jurisdiction, a tribe's complaint must make an allegation "which would have made the United States the real party in interest even if the United States had brought the action as Trustee." *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d at 1140. Judge Webster further noted that the United States had not waived its own sovereign immunity by enacting § 1362 and that there

was equally no reason to believe that the statute abrogated the sovereign immunity of the several states. *Id.*

This line of reasoning is not persuasive. As will be seen below, the right of the United States to act as a trustee is not confined to "federally derived property rights." There is, moreover, inconsistency in saying that the United States must be "the real party in interest" and have a "direct interest" *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d at 1140, and at the same time acknowledging that if the United States sued it would be as a trustee with the real interest necessarily being that of the tribal beneficiaries. Finally, there is no parallel between the immunity of the United States and the immunity of the several states. The interest of the United States as a trustee in empowering its wards to sue the individual states is of a very different character from the United States as trustee consenting to suits against itself. We turn, therefore, to the reasons advanced by Judge Mansfield for the Second Circuit.

Part of Judge Mansfield's reasoning rested on the grant of power by the states to Congress to "regulate commerce . . . with the Indian tribes," U.S. Const., art. I, § 8, cl. 3, and the conclusion from this grant that the states had necessarily "surrendered a portion of their sovereignty as to suit by Indian tribes." *Oneida Indian Nation*, 691 F.2d at 1079 (quoting *Parden v. Terminal Railway*, 377 U.S. 184, 191, 84 S.Ct. 1207, 1212, 12 L.Ed.2d 233 (1964)). The reasoning of *Parden* was rejected in *Welch v. State Dept. of Highways*, 483 U.S. 468, 107 S.Ct. 2941, 2948, 97 L.Ed.2d 389 (1987). In order to abrogate a state's immunity, Congress must express its intention "in unmistakably clear language." *Welch*, 107 S.Ct. at 2948; see also

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985).

Does § 1362 express an unmistakable intention? Statutes passed for the benefit of Indian Tribes "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918)). The Supreme Court has held that § 1362 "suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 474, 96 S.Ct. 1634, 1642, 48 L.Ed.2d 96 (1976). We read § 1362, thus authoritatively interpreted, to mean that the statute does authorize Indian tribes to sue where the United States could sue on their behalf.

The United States could bring suit on the causes of action alleged here. The standard was established long ago. In the *Cherokee Nation* case, chief Justice Marshall observed that the relation between the Indian tribes and the United States "resembles that of a ward to his guardian. They look to our government for protection." *Cherokee Nation v. Georgia*, *supra* at 17. The analogy was suggestive and effective in imposing fiduciary [sic] obligations upon the United States. The dependence of the tribes generated "the duty of protection." *United States v. Thomas*, 151 U.S. 577, 585, 14 S.Ct. 426, 429, 38 L.Ed. 276 (1894); *United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886).

Speaking specifically of the relation of the United States to the Cherokees but using language applicable to the relationship between the United States and any Indian tribe, Justice Hughes wrote that as long as the United States is the guardian of the Indians, "the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid." *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 431, 56 L.Ed. 820 (1912). Addressing the right of the United States as the guardian of non-competent Osage Indians, Chief Justice White upheld the right of the United States to sue "to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the Acts of Congress." *United States v. Board of County Commissioners*, 251 U.S. 128, 133, 40 S.Ct. 100, 101, 64 L.Ed. 184 (1919).

The general proposition is drawn from these cases "that the United States, by virtue of its special relationship with the Indians, has standing to effectuate federal policies by enforcing Indian rights arising out of that relationship." *Cohen's Handbook of Federal Indian Law* (1982) p. 308. The federal oversight of Indian affairs is an "exclusive and compelling interest." See *Housing Authority v. Washington*, 629 F.2d 1307, 1313 (9th Cir.1980) (per Anderson, J.). Each of the four federal causes of action here alleged involve that interest.

The United States is not barred by the immunity of any single state. *Monaco v. Mississippi*, 292 U.S. 313, 319, 54 S.Ct. 745, 746, 78 L.Ed. 1282 (1934). Consequently, if the United States could bring these actions as the trustee of an Indian tribe, the tribes may sue a state under section

1362. The United States, we have concluded, could sue as a trustee on behalf of the tribe to vindicate the rights in the several causes of action here. Consequently the case should not have been dismissed on the ground of the immunity of the state.

3. *The Federal Causes of Action.*

The state maintains that the plaintiffs have not alleged federal causes of action. Obviously there was no duty on the part of Alaska to vote a bonus of \$25,000 to each Native Village. Once having voted the bonus, however, the state could not take it away or dilute it on grounds violative of the fourteenth amendment. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), *reh'g denied*, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973). The plaintiffs allege that such a racially based dilution is what has occurred.

The state's answer is, "How can this be? We were giving a bonus to Native Villages whose membership was formed on a racial basis. We got away from the racial basis by making a nonracial criterion the ground for the distribution." The plaintiffs' answer is that the original scheme of the bonus was based on their identity as political entities. To wipe out their political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the bonus was racially discriminatory is an intelligible

claim. Any governmental action based on the racial character of those affected is presumptively invalid. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485, 102 S.Ct. 3187, 3202-03, 73 L.Ed.2d 896 (1982). Alleging that such discrimination has happened here, the Native Villages have presented a claim which is neither plainly meritless under the Constitution nor foreclosed by prior cases. Cf. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Whether these allegations state a claim upon which relief can be granted is beside the point at this stage of the case. *Bell v. Hood*, 327 U.S. 678, 678-82, 66 S.Ct. 773, 773-76, 90 L.Ed. 939 (1946). The scope of our present inquiry is limited to a determination of whether the district court had jurisdiction. We hold that it did.

The Villages also properly invoked federal subject matter jurisdiction by their allegation that the Commissioner violated federal laws and policies intended to further tribal self-government. If, as they contend, the Commissioner acted because he believed that Native Villages could not receive special benefits from the state, the Commissioner did act in an area where the action may be found to have been preempted by federal law. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Similar conclusions follow as to the third and fourth causes of action where again it may be found that the action of the Commissioner was such as to deny the political reality of the Native Villages because of the Commissioner's view of their racial composition. The pendent claims are cognizable if the four federal claims confer jurisdiction. Accordingly, the decision of the district court is REVERSED and the case REMANDED for further proceedings.

KOZINSKI, Circuit Judge, dissenting.

I am unable to join my colleagues in exploring the boundaries of the eleventh amendment because I do not agree that the district court had subject matter jurisdiction. Subject matter jurisdiction and sovereign immunity are both threshold inquiries, but the former presents a far easier question and I would therefore dispose of the case on those grounds. While I don't necessarily disagree with the majority's analysis of the eleventh amendment issue, the question is a close one, having already caused a split in the circuits; I would await a case where our jurisdiction is more secure before expounding on this difficult point. I must therefore respectfully dissent.

To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as the Supreme Court has repeatedly admonished, it is necessary to state a claim that is substantial: "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion' " *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (citations omitted). We do not have jurisdiction over a claim, no matter how federal it purports to be, that is " 'patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy.' " *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir.1985) (quoting *Demarest v. United States*, 718 F.2d 964,

966 (9th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984)).

While this doctrine has been criticized, *see, e.g., Hagans*, 415 U.S. at 538, 94 S.Ct. at 1379; *Rosado v. Wyman*, 397 U.S. 397, 404, 90 S.Ct. 1207, 1213, 25 L.Ed.2d 442 (1970); *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), it serves an important practical purpose: It prevents plaintiffs from using a federal court's pendent jurisdiction to propel state claims into federal court by attaching them to meritless federal claims. *See Hagans*, 415 U.S. at 555, 94 S.Ct. at 1388 (Rehnquist, J., dissenting); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191-92, 29 S.Ct. 451, 454-55, 53 L.Ed. 753 (1909). And that is precisely what's happening here.

In 1980, the Alaska Legislature enacted a revenue sharing program according to which all unincorporated communities with a Native village government would receive \$25,000 a year. The following year, the state Attorney General advised the Department of Community and Regional Affairs, the state agency responsible for implementing the program, that the program violated the equal protection and public purpose clauses of the Alaska Constitution, art. I, § 1 and art. IX, § 6. In order to comply with the state constitution, the Department made the funds available to all unincorporated communities, whether or not they had Native village governments. The appellants, whose share of the pie may have been diminished when the class of recipients was broadened, disagreed with the Attorney General's analysis and filed this suit.

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is now precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may *permit* states to favor Indians, it certainly does not *compel* it. The villages' equal protection claim is not aided in any way by the fact that the state Attorney General's equality requirement is based on the Alaska Constitution; the federal equal protection clause does not preclude the states from adopting constitutional provisions that guarantee equal treatment for their citizens.

Equally frivolous are the villages' claims based on various federal statutes intended to further tribal self-government. The Indian Reorganization Act, 25 U.S.C. §§ 461-92 (1982 & Supp. IV 1986), comprises a hodgepodge of statutes relating to land transfer and tribal organization. The Indian Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77-80 (codified as amended in scattered sections of title 25), extends a number of federal constitutional rights to members of Indian tribes and authorizes state courts to assume jurisdiction over certain causes of action arising on Indian reservations. The Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of title 25), provides credit to members of Indian tribes. The Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of titles 5, 25, 42 & 50), provides federal assistance for, among other things, tribal governments and school districts educating

tribe members. The Indian Health Care Improvement Act, Pub.L. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of title 25), as its name implies, relates to health care. The Indian Child Welfare Act of 1978, Pub.L. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of title 25), includes provisions covering child custody proceedings and federal assistance for various family-related programs. Many of these statutes provide money to Indian tribes, but that is the full extent of their relevance to this lawsuit. By no stretch of the imagination do they preempt state constitutional provisions calling for equal treatment of Indians and non-Indians.

The villages' third and fourth federal causes of action are similarly insubstantial. Section 476 of title 25 permits Indian tribes to organize, adopt a constitution, and negotiate with the federal, state and local governments. It is difficult to ascertain exactly how this statute could be violated by diluting the villages' share of state revenues. The villages' contention that the dilution extinguished their powers of self-government and destroyed their Native culture, in violation of the first amendment, is hyperbole.

Even under the most generous construction of the federal Constitution and title 25 of the United States Code, the four federal claims fit any of the *Hagans* formulations of insubstantiality: They are "obviously frivolous;" they are "plainly unsubstantial;" they are "absolutely devoid of merit." They serve a single purpose: to transport state claims into federal court. I would accordingly affirm the district court's dismissal for lack of a substantial federal question and save the difficult eleventh amendment issue for another day. Judging from the

state's relationship with the villages, that day may be coming soon enough.
